BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER B. PARIS	)	
Claimant	)	
	)	
VS.	)	
	)	
T.O. HAAS TIRE	)	
Respondent	)	Docket No. 1,019,006
	)	
AND	)	
	)	
CINCINATTI INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the November 15, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ granted claimant's request for medical treatment and temporary total disability benefits after he concluded claimant sustained an accidental injury arising out of and in the course of his employment with respondent.

The respondent requests review of this decision alleging the ALJ erred in concluding the claimant sustained his evidentiary burden of proving a compensable claim. Respondent contends the accident claimant alleges could not have occurred because none of the invoices generated on August 20, 2004 reflect any work was performed on semi-truck tires as claimant alleges happened. Moreover, respondent denies claimant provided the specific notice required by K.S.A. 44-520.

Claimant argues the ALJ's preliminary hearing Order should be affirmed in all respects.

The Board must address the following issues:

1. Whether claimant sustained an accidental injury arising out of and in the course of his employment with respondent;

2. Whether claimant provided timely notice of his injury as required by K.S.A. 44-520; and

3. Whether claimant is entitled to temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed and working as a tire technician on August 20, 2004, when he alleges he hurt his back while changing a semi-truck tire. Claimant testified he experienced a sharp and severe pain that went up his spine while changing the tire. He initially believed this pain was due to a pinched nerve in his back and thought this would resolve on its own.

Claimant further testified he reported the accident to the assistant manager, Darryl Meier, on Saturday, August 21, 2004, just after his lunch break, and also to the store manager, Earl Van Ranken, on August 24, 2004. Both of these individuals deny any notice of claimant's work-related injury on those dates. The work records show that Mr. Meier left the store at 10:00 or 10:30 a.m. that Saturday. Other records show that no semi-truck tires were repaired on August 20, 2004. Moreover, it is respondent's contention that claimant was too inexperienced to work alone, and that he would have been paired with a more experienced employee. So, if he was injured, it would likely have been witnessed. Thus, based upon this evidence, respondent adamantly maintains that claimant has not established that he sustained an accidental injury on August 20, 2004.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[1] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[2]

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[1] K.S.A. 44-501(a).

[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.[3]

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

The ALJ concluded claimant had met his evidentiary burden in this respect, and the Board, after reviewing the evidence offered by the parties, finds no compelling reason to alter this conclusion. The Board finds that when there is conflicting testimony contained in the record, it is significant that the ALJ had the opportunity to observe the testimony of the claimant. In granting claimant's request for medical treatment and temporary total disability benefits, the ALJ must have found claimant to be credible, and he must have been unpersuaded by the testimony of Mr. Van Ranken. The Board finds, in this instance, that some deference should be given to the ALJ's conclusions because he had the opportunity to assess the claimant's credibility when he testified. The ALJ's conclusion that claimant sustained an accidental injury that arising out of and in the course of his employment with respondent is affirmed.

Respondent also asserts that claimant failed to provide the statutorily required notice. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the

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[3] *Id.* at 278.

[4] *Id.* at 278; *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

> notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Mr. Van Ranken concedes he received notice of claimant's injury on Wednesday, August 25, 2004. He admits claimant told him that he had hurt his back at work. The statute referenced above requires an injured worker to provide enough information so as to allow a reasonable person to have reason to believe or to be placed on notice that work activities have caused or were causing an injury.[5] Notice is sufficient when it alerts the respondent of the possible work connection of the alleged injuries.[6]

Here, both the ALJ and the Board find claimant gave sufficient and timely notice. Both claimant and his wife told his supervisor that he sustained an accidental injury while working for respondent. There is no dispute that claimant was hired to be a tire technician and that he alleges an injury occurred while performing that task. Given the fact that he performed that job all day long, it might be difficult to provide a precise time of his injury, particularly when he believed it would go away on its own. In any event, the Board affirms the ALJ's finding that the notice provided was sufficient.

As for the issue of temporary total disability benefits, the Board has no jurisdiction to consider that issue at the present time. Whether claimant suffered accidental injury and whether the injury arose out of and in the course of employment are designated in K.S.A. 44-534a as jurisdictional issues. Notice and written claim are also designated as jurisdictional issues under K.S.A. 44-534a. Whether the ALJ should, in a given set of circumstances, authorize temporary total disability compensation following a preliminary hearing is not a question that the Board has authority to consider. K.S.A. 44-534a specifically grants an administrative law judge the authority to decide at a preliminary hearing, issues concerning the payment of temporary total disability compensation and the Board has no authority to review that decision. Accordingly, that portion of respondent's appeal must be dismissed. Of course, the respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2).

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated November 15, 2004, is affirmed in part and dismissed in part.

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[5] *Hawbaker v. James R. Turnbull Painting*, No. 184,632, 1998 WL 229863 (Kan. WCAB Apr. 24, 1998).

[6] *Looney v. Garvey International*, No. 216,445, 1997 WL 557533 (Kan. WCAB Aug. 14, 1997).

IT IS SO ORDERED.

Dated this _____ day of March, 2005.

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director